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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-930

PANHANDLE EASTERN PIPELINE CO., et al.,
Petitioners,

vs.

FEDERAL POWER COMMISSION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner, the Attorney General of Illinois, for and on behalf of Illinois citizens who are creditors of Panhandle Eastern Pipeline Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on October 29, 1974. This judgment denied the State of Illinois domain over $167,317.65 currently in the custody of the United States Treasurer pursuant to 28 U.S.C. § 2042.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was printed, but not published, and appears herein as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on October 29, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a federal court under the guise of exercising custodial jurisdictional authority, may, in effect, create federal escheat powers and thereby invest the Federal Government with powers which under our federalism reside exclusively with the states?

2. Whether the State of Illinois is a claimant entitled to dominion over unclaimed funds within the meaning of 28 U.S.C. § 2042?

3. Whether the equitable conditions under which a federal court may condition the relief of a stay order may take precedence over the substantive rights created by an Illinois statute?

4. Whether the Court of Appeals for the Eighth Circuit misinterpreted the law of Illinois by holding that the Illinois statute created only "custodial rights" in the State of Illinois?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 2042. Withdrawal

No money deposited shall be withdrawn except by order of court.

In every case in which the right to withdraw money deposited in court has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

STATEMENT OF THE CASE

In 1942, suit was brought by Panhandle Eastern Pipeline Company in the Court of Appeals for the Eighth Circuit under 15 U.S.C. § 717r(b). The suit sought the reversal of an interim rate reduction order made by the Federal Power Commission on September 23, 1942. *Panhandle Eastern Pipeline Co.* v. *Federal Power Commission*, 143 F. 2d 488, 490 (1944). On December 7, 1942, the Court of Appeals entered a stay order pending an adjudication on the merits of the reduction order. The stay order prevented the rate reduction order from going into effect provided that the difference between the existing rate and the reduced rate ordered by the FPC be paid to a custodian of the Court. *Panhandle Eastern Pipeline Co.* v. *Federal Power Commission*, 179 F. 2d 896, 898 (1950). The rate reduction order was affirmed by the Court of Appeals (143 F. 2d 488) and also subsequently affirmed by this Court. *Panhandle Eastern Pipeline Co.* v. *Federal Power Commission*, 324 U.S. 635 (1945).

Between the date that the stay order was entered and a resolution of the merits confirming the reduction order, some $24,858,945.72 was accumulated pursuant to the conditions of the stay order. *Panhandle Eastern Pipeline Co.* v. *Federal Power Commission*, 179 F. 2d 896, 898 (1950). About 95% of this total amount was returned to the ultimate consumers, but there remained in the custody of the Court of Appeals an undistributed residue of about $1,360,000. *Panhandle Eastern Pipeline Co.* v. *Federal Power Commission*, 179 F. 2d 896, 899 (1950). The undistributed residue was held by the Court of Appeals for five years (as required by 28 U.S.C. § 2042) during which

time it was reduced by claims of some ultimate consumers. On January 17, 1955, the Court of Appeals for the Eighth Circuit ordered that the Illinois portion of the unclaimed funds, amounting to $167,389.06, be transferred to the U.S. Treasury in accordance with 28 U.S.C. § 2042.

On March 18, 1974, the Attorney General of Illinois filed a petition in the Court of Appeals for the Eighth Circuit which sought dominion over the Illinois portion of the unclaimed funds which currently amount to $167,317.65.[1] R1-8.

This petition alleged that the State of Illinois was entitled to dominion over these funds pursuant to Ill. Rev. Stat. 1973, Ch. 141, pars. 104(b), 107, and 114 and 28 U.S.C. § 2042. R 4.

The applicable Illinois statute (Ill. Rev. Stat. 1973, Ch 141, par. 101 et. seq.) is patterned after the Uniform Disposition of Unclaimed Property Act. The Illinois statute purports to give Illinois the beneficial use of funds which a utility has been ordered to refund to Illinois customers for utility service in Illinois after the funds become presumptively abandoned. Ill. Rev. Stat. 1973, Ch. 141, pars. 104(b), 115, 118. The statute requires that notice by publication be given to the owners of property presumptively abandoned. Ill. Rev. Stat. 1973, Ch. 141, par 112. The

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1. Records of the Clerk of the Court of Appeals for the Eighth Circuit show that only two claims have been paid in the twenty years since 1955. On November 16, 1955, the Court ordered that $62.64 be paid to Mr. Charles Lubbe of Peoria, Illinois. On December 22, 1958, the Court ordered that $8.77 be paid to R. F. Miller of Urbana, Illinois.

statute also states that the money shall be held by Illinois, but shall be paid to the true owner upon proof of his ownership interest. Ill. Rev. Stat. 1973, Ch. 141, pars. 120, 121. Experience shows that most of these funds will never be claimed. *Douglas Aircraft Company* v. *Cranston*, 58 Cal. Rptr. 462, 374 P. 2d 819, 821 (1962).[2]

The United States Treasurer claims custody of this money under the provisions of 28 U.S.C. §§ 2041 and 2042. This federal statute, like the Illinois statute, purports to give the United States beneficial use of the funds until "[a]ny claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him." The State of Illinois asserts that it is a claimant with a right to these monies within the legislative intent of the above-quoted passage.

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2. In this instance, less than .043% of the original $167,389.06 has been claimed in the last twenty years. See footnote 1.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS IMPROPERLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

This is a case of first impression which has heretofore not been decided by this Court. It cuts deeply into the fabric of our federalism, since the decision of the Court of Appeals, in essence and effect, destroys the power of a state to act as *parens patriae* for its citizens and usurps authority which resides exclusively with the state. The right to protect and safeguard the interest of its citizens lies primarily with the states. Thus it is the states, not the Federal Government, in which the authority is vested to exercise the custodial power over funds which belong to their citizens and, if such funds are not claimed, to derive the benefits flowing from these funds. For these reasons, it is totally immaterial what type of statute the particular state has promulgated in order to administer such unclaimed funds; the type of statute issued and adopted by a state dealing exclusively with the sovereign rights of the state is the business of the state and not that of the Federal Government.

The Court of Appeals has misconstrued the legislative intent of 28 U.S.C. § 2042, by denying the State of Illinois the status of a rightful claimant to these monies within the meaning of the federal statute. Perhaps in some instances a misconstruction of the intent of a federal

statute might not warrant plenary consideration of the statute by this Court, but in this case, the egregious construction of the federal statute disparages a substantive right created by Illinois law which grants to Illinois the right to the beneficial use of this abandoned money. Ill. Rev. Stat. 1973, Ch. 141, pars. 101 et seq Hence it is imperative that this Court decide the federal question "whether a state when acting pursuant to local statutes patterned after the Uniformed Disposition of Property Act is a claimant of monies in custody of the U.S. Treasurer under 28 U.S.C. § 2042?"[3] For while the source of the right of the state to acquire the beneficial use of claimed funds is of ancient origin (*Anderson National Bank* v. *Luckett*, 321 U.S. 233, 240, 88 L. Ed. 692 (1943)), the right of the United States as a sovereignty of delegated powers to the beneficial use of the same res is not apparent. U.S. Const., Art. I, § 8; Amend. X. Indeed, this Court has frequently stated that when the Federal Government enters a field historically local, some clear relation of the asserted power to one of the delegated powers should be shown. (Dissenting opinion of Mr. Justice Douglas in *United States* v. *Oregon*, 366 U.S. 643, 654, 6 L. Ed. 2d 575 (1961)).

While petitioner does not here contend that 28 U.S.C. § 2042 is invalid because not based on any of the enumerated powers of Article I, § 8, petitioner does contend that

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3. Such statutes have been adopted in twenty states (Am. Jur. 2d Desk Book, Document Number 129) and create important rights to beneficial use of property that has been presumptively abandoned within the jurisdiction of the state.

its application in the present instance to the facts at hand is invalid and constitutionally improper and inadmissible. Once a state acquires an interest in abandoned property within its jurisdiction, it must be regarded as a rightful claimant to the property within the meaning of 28 U.S.C. § 2042.[4]

II.

THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS ERRONEOUSLY DECIDED THAT THE EQUITABLE CONDITIONS UPON WHICH IT CONDITIONED THE GRANT OF A STAY ORDER MAY TAKE PRECEDENCE OVER THE SUBSTANTIVE LAW OF ILLINOIS.

In *Hanna* v. *Plummer*, 380 U.S. 460, 473, 14 L. Ed 2d 8 (1965), this Court specifically reserved the question of under what circumstances a procedural rule of the federal courts may take precedence over a conflicting substantive state law in diversity actions. The question presented here is similar to that reserved in *Hanna* v. *Plummer* because the fund in controversy here was created by the

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4. The situs of this abandoned property is unquestionably within Illinois. The funds are owed to ultimate consumers of natural gas in Illinois whose last known addresses were in Illinois. The debtor, the Illinois Natural Gas Company, a wholly owned subsidiary of Panhandle Eastern Pipeline Company (143 F. 2d 488, 490), rendered the utility service to Illinois customers within that State and billed and collected in Illinois the overcharges which are now debts owed to Illinois consumers. No other state has any jurisdictional contacts with these monies.

conditions of the stay order entered by the Court of Appeals on December 7, 1942. *Panhandle Eastern Pipeline Co.* v. *Federal Power Commission*, 179 F. 2d 896 (1950). Petitioners respectfully submit that the equitable conditions originally imposed by the Court of Appeals to preserve the status quo, may not now operate so as to disparage the substantive right of Illinois to the beneficial use of abandoned property within its jurisdiction. For to allow a discretionary equitable condition imposed by a federal court to take precedence over a substantive state law is either to exhalt the condition to the undeserved status of a law made in pursuance of the Constitution or to deny the State of Illinois the rights reserved to it under the Tenth Amendment. It is a salient fact in this litigation that if the Court of Appeals had exercised its discretion not to grant the stay, that the entire amount of unclaimed money now in controversy would have become imputed income to Illinois citizens in the form of reduced utility rates. Can it be said that the discretionary conditions under which the Court of Appeals granted the stay may now operate to deprive Illinois citizens of a substantial property interest that they would otherwise have had?

Such an exercise of discretion may not be used to deprive Illinois citizens of $167,317.65 that they otherwise would have had in the form of reduced utility rates. The State of Illinois is now entitled to dominion over this money both in its capacity of *parens patriae* for these unknown Illinois consumers and by virtue of its substantive law which creates a right to the beneficial use of presumptively abandoned property within its jurisdiction.[5]

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5. To say that the Federal Government merely holds these funds as a custodian for the rightful owners is a cruel ruse on the Illinois creditors. Court records show

III.

THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT STATE QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE STATE LAW.

The Court of Appeals avoided the conflict that would be caused if the right of Illinois to the beneficial use of this money were in conflict with the right of the United States to the beneficial use of the money by misconstruing the applicable Illinois law. According to the Court of Appeals, Illinois acquires no property right to the beneficial use of this money because the applicable Illinois statute is "custodial" and not 'escheat-type". Such a construction is flatly contradicted by the provisions in the Illinois statute giving the State of Illinois

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that in the twenty years since the funds were transferred to the U.S. Treasurer, less than .043% of the money has been claimed. Other courts have recognized the potential constitutional problems created by such long continued de facto ownership (*Application of the People of the State of New York*, 138 F. Supp. 661, 666 (1956)), which emanate from the fact that the Federal Government possesses no "escheat" power. *American Loan and Trust Co.* v. *Grand Rivers Co.*, 159 F. 775 (C. C. Ky. 1908); *U.S.* v. *Klein*, 303 U.S. 276, 82 L. Ed. 840 (1937). In fact, the slight jurisdictional contacts which the Federal Government has with these funds may actually frustrate a search for them by Illinois claimants. In order for an Illinois claimant to become aware of his entitlement to these rebates he must be able to divine the fact that the rebates were the result of an order entered by a federal court in Missouri 26 years ago. It is therefore not surprising that no Illinois claimant has recognized his entitlement to these funds within the last 17 years.

the income accruing from the property (Ill. Rev. Stat. 1973, Ch. 141, par. 115), allowing Illinois to commingle the money with other funds in its State Pension Fund and presumably spend it (Ibid., par. 118), authorizing Illinois to sell the property at a public sale and transfer good title (Ibid., par. 117), and creating statutory presumptions of abandonment (Ibid., par. 104). The notice provisions of par. 112 are also consistent with the inference that Illinois acquires a property interest in this abandoned property and must therefore give adequate notice to the unknown owners to satisfy due process requirements. All of these statutory provisions are inconsistent with the bland assertion by the Court of Appeals that the Illinois statute is "custodial" and not "escheat-type."[6]

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6. It is difficult to understand how a statute relating to personal property can be "escheat-type." Escheat at the common law referred only to real property and was derived from the tenurial interest that the lord of a fee retained to re-enter land when it became vacant either by failure of heirs or corruption of the blood of the tenant. Black's Law Dictionary. In America, statutes created a right in the sovereign to acquire title to real property for failure of heirs. E.g.Ill.Rev. Stat. 1973, Ch. 49, par. 1 et seq.

The right of the sovereign to acquire title to personal property is based on its status of abandonment as *bona vacantia* and the sovereign's ultimate control of all property within its jurisdiction. 7 Holdsworth, *A History of English Law*, 2 ed., 495, 496; *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 88 L. Ed. 692, 701 (1944). It is this right which Illinois has clearly asserted by creating a statutory presumption of abandonment of these funds. Ill. Rev. Stat. 1973, Ch. 141, par. 104(b).

In support of its statement that the Illinois statute is custodial and not escheat-type, the Court of Appeals cited the case of *Insurance Co. of North America* v. *Knight*, 8 Ill. App. 3d 371, 291 N.E. 2d 40, 44 (1972), appeal dismissed, 94 S. Ct. 165 (1973). At the page cited, the following passage appears:

> The plaintiff also alleges that with the passage of years and the functioning of office procedures, plaintiff's files have been destroyed so that the particular transactions cannot be reconstructed. Upon such allegations and supporting affidavit, plaintiff has, at most, stated that there have been transactions of the nature described but no more than explains a possibility or error in concluding that the instruments are abandoned property under the statute.
>
> The latter allegations actually narrow the issue to that of the burden of proof and plaintiff contends that the State must show the existence of rights in owners to which the State may succeed for custodial purposes.
>
> We agree with the statement of plaintiff that the rights of the State are derivative from the rights of the owner, and that the State has no greater right than that of the payee owner. (*State* v. *Standard Oil Co.*, 5 N.J. 281, 74 At. 2d 565; *State* v. *Elizabethtown Water Co.*, 40 N.J. 280, 191 At. 2d 457.) It is the theory of the legislation at issue that it is custodial in character and that the State takes custody for the owner. *Uniform Laws Annotated*, Vol. 9A, p. 413., Commissioners Prefatory Note.
>
> 8 Ill. App. 3d at p. 876.

This statement by the Illinois Appellate Court obviously uses the word "custodial" to mean that the Illinois statute does not purport to vest absolute title in the State. This passage does not mean that Illinois acquires no important rights to the property while it holds it in cus-

tody. (The State of Illinois acquires the right to the interest earned by the property. Ill. Rev. Stat. 1973, Ch. 141, par. 115.) In fact, since experience shows that most of the money will never be claimed (*Douglas Aircraft Co.* v. *Cranston*, 24 Cal. Rptr. 851, 374 P. 2d 819 (1962)), the right to the beneficial use of the property may approach de facto ownership of the funds. The Illinois statutory scheme expressly recognizes this likelihood of de facto ownership by providing that proceeds from the sale of abandoned property shall be deposited in the State Pensions Fund. Ill. Rev. Stat. 1973, Ch. 141, par. 118. Indeed, the *Insurance Company of North America* v. *Knight* case, when read in its entirety, is authority for the proposition that Illinois acquires important property rights to abandoned personalty under its statute because if such were not the case why else would Illinois have brought the lawsuit?

IV.

OTHER FEDERAL CASES DISTINGUISHED.

Illinois concedes that when funds are paid into a federal court pursuant to a federal statute which creates federal rights in the creditors to the funds, that in such circumstances a state claim to such funds will fail under the Supremacy Clause. *United States* v. *Oregon*, 366 U.S. 643, 6 L. Ed. 2d 575 (1961). However, where the fund is created as a result of a discretionary act by the federal court, and such funds would otherwise have passed to citizens of the state, then such a discretionary procedural condition may not operate to disparage a state substantive right. For just as a state court procedural condition may not operate to disparage a federally created right guaranteed in the United States Constitution (*Fay* v.

Noia, 372 U.S. 391, 9 L. Ed. 2d 837 (1963)), so too, a federal court's procedural condition when imposed in its discretion and not mandated by a federal statute, may not operate here to disparage the sovereign prerogative of a state to claim abandoned property within its jurisdiction. In order to avoid the conflict between a federal court's procedural rule and the sovereign prerogative of Illinois to these funds now presumptively abandoned, 28 U.S.C. § 2041, must be interpreted to include the State of Illinois as a rightful claimant to these funds in this instance.

CONCLUSION

For these reasons, it is respectfully asked that a writ of certiorari issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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